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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 112486

CASE NBR 86-1-05541 CSY
SHORT TITLE Maxwell, Chester L. DOCKETED: Sep 19 1986
VERSUS Florida

Date	Proceedings and Orders
Sep 19 1986	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Oct 8 1986	Brief of respondent Florida in opposition filed.
Oct 16 1986	DISTRIBUTED. October 31, 1986
Nov 3 1986	REDISTRIBUTED. November 7, 1986
Nov 10 1986	REDISTRIBUTED. November 14, 1986
Nov 17 1986	The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

No. 86-5541

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

CHESTER LEVON MAXWELL

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DENIAL OF ACCESS TO TRIAL COUNSEL'S FILE DEPRIVED PETITIONER OF A FULL AND FAIR HEARING ON HIS POST-CONVICTION CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

CHESTER LEVON MAXWELL

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on May 15, 1986, for which rehearing was denied on July 21, 1986.

CITATION TO OPINIONS BELOW

The Supreme Court of Florida filed its Opinion, which is reported as Maxwell v. State, 490 So.2d 927 (Fla. 1986), on May 15, 1986. A copy of the Opinion is attached as Appendix A. A copy of the July 21, 1986, Denial of Rehearing is attached as Appendix C.

GROUNDS FOR JURISDICTION

Judgment of the Supreme Court of Florida was filed on May 15, 1986. Petitioner's Motion for Rehearing was denied on July 21, 1986. This Petition for Writ of Certiorari was timely filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3) in that Petitioner is claiming deprivation of a right provided by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 to the Fourteenth Amendment to the United States Constitution.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

This case also involves Section 921.141, Florida Statutes (1979) (entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence") which is set forth as Appendix D.

STATEMENT OF THE CASE

Petitioner was tried by a jury, found guilty, convicted, and sentenced to death for murder. On direct appeal, the Florida Supreme Court affirmed. Maxwell v. State, 443 So.2d 967 (Fla. 1983). A copy of this Opinion is attached as Appendix B. Petitioner sought post-conviction relief in state court. His Motion was denied and affirmed on appeal by the Florida Supreme Court. Maxwell v. State, 490 So.2d 927 (Fla. 1986).

The State of Florida had scheduled Petitioner for execution on November 7, 1984. On October 30, another attorney had volunteered to represent Mr. Maxwell and apply for a stay of execution as well as to file a motion for post-conviction relief. Papers were prepared and filed on November 5, 1984, and on November 6, Petitioner and his counsel appeared for the hearing on their emergency application. Prior to the hearing, counsel only had minimal opportunity to interview Mr. Maxwell and to investigate the possibility of claims which would support a collateral attack on his conviction or sentence.

While Petitioner, through counsel, had sought a stay of execution from the trial court pending the opportunity to prepare for a hearing on his Motion for Post-conviction Relief, the court required Petitioner on short notice to present all of his evidence in support of

the Motion. One of the eight points raised in the post-conviction motion was that Petitioner was denied effective assistance of counsel. Testimony was then taken from Jeffrey Harris, Esq., who had represented Mr. Maxwell during the trial.

In response to inquiry, Mr. Harris stated that he refused to allow Petitioner's attorney to inspect his file.

> Q. And have you refused me permission to see that file?
>
> A. That's correct.
>
> Q. Do you have a reason for that?
>
> A. It is my reason and belief that I believe that if I'm to divulge or reveal or to allow people to inspect my files it should be done by court order from either side and the reason for that belief is that I think and believe wholeheartedly that if an attorney who's trial attorney is preparing his case for trial that if it's going to be subject to review a couple of years later it may put a chilling effect on an attorney making notes or work product or whatever have you.
>
> In other words, that attorney may not be as free to express himself within his own confines of his file and, consequently, until a court orders me to do so and that's determined to be a lawful order, I have refused permission to turn it over to you. Page 19, line 10 through page 20, line 4, Transcript of Hearing taken before the Honorable Thomas M. Koker, Jr., on November 6, 1984.

The court then denied Petitioner's Motion to Compel Production of trial counsel's file based on Mr. Harris' reasoning.

Since it had been approximately three years since Petitioner's trial, Mr. Harris had difficulty remembering specifics with regard to the particulars of his trial preparation and thought processes.

> [Answer by Mr. Harris] You have to remember it's three years I have not looked at that file and there's just things that I just don't remember because of the multitude of things that have happened since then. Page 45, lines 2-5, Transcript of Hearing taken before the Honorable Thomas M. Koker, Jr., on November 6, 1984.

On November 5, 1984, the trial court denied Petitioner's Motion for Post-conviction Relief and also denied the application to stay execution. Denial of both of these motions was appealed to the Florida Supreme Court. Petitioner requested the court to find that he had not had a full and fair hearing on his motion based in part on the court below's refusal to permit access to the trial counsel's case file. This issue was raised in a memorandum, during oral argument, and in the motion for rehearing.

REASONS FOR GRANTING THE WRIT

In Strickland v. Washington, 466 U.S. 668 (1984) this court recognized that a death row inmate under the appropriate circumstances can have a constitutional claim of actual ineffectiveness of counsel stemming from a capital sentencing proceeding. In the decision the court commented that

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id., at page 689.

The court also noted that inquiry into counsel's conversations with the then defendant, which are normally privileged, may be critical to a proper assessment of trial counsel's practical and strategic decisions with regard to investigation and the overall litigation. Certainly of equal value would be an examination of trial counsel's file, particularly as in this case where counsel did not have a

clear recollection of the circumstances or his perspective at the time in question.

In effect the Florida Supreme Court sustained a work product objection to a former client's access to trial counsel's file. Denying this access while requiring the Petitioner to go forward on an evidentiary hearing on his post-conviction motion does not comport with notions of due process. At least one court has held the former client is entitled to access to the requested attorney's file in a post-conviction proceeding. Spivey v. Zant, 683 F.2d 881 (5th Cir. 1982). The court specifically held that "the work product doctrine does not apply to the situation in which a client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation." Id. at 885. That court went on to comment that deprivation of access to the attorney's file tainted the hearing since the file may contain relevant information with regard to the issues.

The State of Florida has provided a procedural vehicle for making a claim of ineffectiveness of counsel. In order to be afforded a full opportunity to present evidence in support of the claim, no restriction should be placed upon consideration of the attorney's file, which may very well be material to the merits of the claim of ineffectiveness. The Florida Supreme Court has deviated from this principle and its decision is in conflict with Spivey v. Zant, id. Therefore, review on writ of certiorari should be granted.

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Telephone: (305) 462-3300

By: _____
Andrew A. Ostrow

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

CHESTER LEVON MAXWELL

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the Bar of the Supreme Court of the United States and that I served this Petition for Writ of Certiorari on Respondent by depositing a true and correct copy of the document in the United States mail box, postage prepaid, addressed to the following counsel of record in the courts below:

RICHARD G. BARTMON
ROBERT F. TEITLER
Assistant Attorneys General
Office of the Attorney General
Department of Legal Affairs
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401

All parties required to be served have been served on this 19th day of September, 1986.

_____
Andrew A. Ostrow

APPENDIX A

Supreme Court of Florida

Nos. 66,117 & 66,129

CHESTER LEVON MAXWELL, Petitioner,

vs.

LOUIE L. WAINWRIGHT, Respondent.

CHESTER LEVON MAXWELL, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[May 15, 1986]

BOYD, C.J.

Chester Levon Maxwell, a state prisoner under sentence of death,* filed with this Court a petition for habeas corpus challenging the legality of his conviction and sentence. He also filed a motion to set aside judgment and sentence under Florida Rule of Criminal Procedure 3.850. The trial court denied the rule 3.850 motion, and Maxwell appealed the ruling to this Court. In connection with his habeas corpus petition and his appeal of the denial of post-conviction relief, Maxwell moved for a stay of the then-scheduled execution of the sentence of death pending further consideration of the petition and the appeal. Because a majority of the Court found that the matters at issue could not be satisfactorily resolved on an expedited basis, we entered a stay of execution on November 6, 1986. Having now given careful

* The prisoner's convictions and sentence of death were affirmed on appeal by this Court. Maxwell v. State, 443 So.2d 967 (Fla. 1983).

consideration to all the issues raised in both of the proceedings before us, we affirm the denial of the motion to set aside judgment and sentence and deny the petition for habeas corpus.

APPEAL OF DENIAL OF RULE 3.850 MOTION

Appellant's motion to set aside judgment and sentence, filed in the circuit court in which he was tried and sentenced, presented eight challenges. The circuit court summarily dismissed seven of the eight contentions on the ground that they were improper matters for collateral attack, being matters that must be presented by objection at trial and argument on appeal. On the eighth issue put forth by the motion--ineffective assistance of counsel at trial--the trial court held an evidentiary hearing but then denied relief. Appellant argues that the court erred in summarily dismissing seven of his eight contentions and denied him a full, fair and meaningful evidentiary hearing on the one issue not summarily dismissed.

By his motion below and now by appeal Maxwell argues that he was denied a fair trial before an impartial jury by the excusal of a juror who, appellant argues, had merely expressed some hesitation about the use of capital punishment. Appellant argues that the juror was not clearly shown to be unqualified to impartially serve in a capital trial. The lack of an objection on this ground at trial, however, was a waiver of the argument so it is not cognizable by motion for post-conviction relief. Armstrong v. State, 429 So.2d 287 (Fla.), cert. denied, 464 U.S. 865 (1983). Therefore the trial court was correct to summarily dismiss the rule 3.850 claim raised on this ground. Moreover, under established Florida law, the juror was properly excused because, based on the record of the original trial, it was clear that the possibility of a death sentence rendered the juror unable to impartially participate in the determination of guilt or innocence. In affirming Maxwell's conviction on appeal, we held that this same contention with regard to another prospective juror had been waived by the lack of a timely objection at trial,

but added, "Moreover, if we were to reach the merits of this point we would find no error because the juror in question was properly excused." Maxwell v. State, 443 So.2d 967, 970 (Fla. 1983). Both prospective jurors were properly excused for cause. Wainwright v. Witt, 105 S.Ct. 844 (Fla. 1985).

Appellant argues that his right to a fair trial was violated when the venire of prospective jurors were able to see the appellant in the custody of officers. This was a question of procedural error cognizable on appeal if it had been raised by objection and preserved for appellate review. But it is not cognizable now. Moreover, the mere viewing of a defendant in the custody of officers does not raise a question of denial of indicia of innocence as in cases in which the accused is brought into court in prison garb or shackles. The close escort was a routine security measure and it should not lightly be presumed that prospective jurors would perceive it as anything else. There was no violation of the right to a fair trial in this regard. United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); Wright v. Texas, 533 F.2d 185 (5th Cir. 1976).

Appellant argues that he was denied a fair and reliable sentencing proceeding because the trial court improperly limited the jury's consideration to only statutory mitigating circumstances. Reliance on this issue, however, was waived at trial by the lack of an objection. Moreover, the standard instructions based on the sentencing statute did not have the effect of limiting the jury's consideration as asserted by appellant. Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933 (1981). Non-statutory mitigating evidence was presented to the jury. The jury was not misled on the permissibility of considering all mitigating evidence it found persuasive. See Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982).

Appellant argues that the trial court erred in instructing the jury that its sentencing recommendation, either for death or

life imprisonment, had to be by majority vote. There was no objection at trial so the error, if error there was, was waived and provides no basis for relief by way of a collateral proceeding. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Armstrong v. State, 429 So.2d 287 (Fla.), cert. denied, 464 U.S. 965 (1983). Moreover, we believe that affording relief on the ground of this asserted error would depend on a showing of prejudice. Jackson v. State, 438 So.2d 4 (Fla. 1983); Harich v. State, 437 So.2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). Unless it can be shown that the jury erroneously believed it had to have a vote of seven to make a recommendation and that this mistake affected their deliberations in that at some point a tie vote was reached, it cannot be established that any prejudice resulted from the erroneous instruction. The record shows that at trial the jury collectively indicated to the court that its sentencing recommendation was in fact reached by a majority vote.

Appellant argues that his right to a fair and reliable sentencing hearing was violated because the trial court instructed the jury on all the statutory aggravating circumstances without regard to whether they were supported by evidence. If there was error by the trial court in this regard, it was of the type that is reviewable only when challenged by objection at trial and argument on appeal. Such a contention is not a ground for relief under rule 3.850. Moreover, the instructions given at the trial were not erroneous and appellant had full opportunity to argue against the applicability of any or all of the aggravating circumstances. See Straight v. Wainwright, 422 So.2d 827 (Fla. 1982).

Appellant argues that the trial court's instructions to the jury failed to adequately define the aggravating circumstance that refers to the capital felony being "especially heinous, atrocious, or cruel." This is another matter that could only be reviewed by means of objection at trial and presentation on appeal. Moreover, the argument is without merit. The

instruction followed the statutory words as refined and construed by this Court. See Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Appellant argues that the sentencing proceeding culminating in his sentence of death was fundamentally unfair because of the failure to disclose the contents of a presentence investigation report to him. As we said when this issue was presented on appeal, the record shows that a copy of the report was supplied to defense counsel before sentencing. Maxwell v. State, 443 So.2d at 971. Thus the defendant through counsel had an opportunity to examine, challenge, rebut, deny, and use any relevant information contained in the report. See Gardner v. Florida, 430 U.S. 349 (1977); Songer v. State, 419 So.2d 1044 (1982). Appellant seems to argue for a formal requirement that the report be physically placed in the defendant's hands. This position is completely without merit.

We come now to the only issue raised by the motion not summarily dismissed by the lower court and the only issue properly cognizable on the merits in this proceeding. Appellant argues that he received ineffective assistance of counsel at his trial in violation of his sixth amendment rights and that the court below in ruling on his motion to vacate the judgment denied him an adequate evidentiary hearing. We find that the hearing on the motion comported with due process principles.

A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. Strickland v. Washington, 466 U.S. 668 (1984); Downs v. State, 453 So.2d 1102 (Fla. 1984). A court considering a

claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test in it is clear that the prejudice component is not satisfied.

Appellant contends that his trial lawyer was ineffective in not objecting to the excusal for cause of two prospective jurors on the ground of their views on capital punishment. However, we cannot find ineffectiveness based on lack of objection or argument when counsel could reasonably have decided that such objection or argument would have been futile in view of the established rules of law on jurors' qualifications. The views of the prospective jurors clearly would have interfered with their ability to follow the instructions of the court. Therefore, they were properly excused for cause. See Adams v. Texas, 448 U.S. 38 (1980).

Next appellant argues that counsel at trial was ineffective in that he inadequately investigated appellant's background and related matters in preparation for the penalty phase of the trial. However, the record shows that defense counsel did present testimony of witnesses concerning the defendant's character and background. The testimony went beyond statutory mitigating factors to include also nonstatutory factors. The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done than was actually done. Moreover, it is highly doubtful that more complete knowledge of appellant's childhood circumstances, mental and emotional problems, school and prison records, etc., would have influenced the jury to recommend or the judge to impose a sentence of life imprisonment rather than death. See, e.g., Porter v. State, 478 So.2d 33 (Fla. 1985). We therefore reject the ineffectiveness claim on this point.

Appellant argues that counsel was deficient in failing to object to the court's instructions and the prosecutor's arguments to the jury on the mitigating circumstances it could consider.

Appellant says the instructions and argument limited the jury's consideration to statutory factors only. The instructions given, however, were not erroneous. Further, the admission of testimony presented on behalf of the defendant relating to mitigating factors other than those in the statute made known to the jury that the range of matters to be considered went beyond the statutory mitigating circumstances on which they were instructed.

Next appellant contends that his counsel was ineffective in not asking the court for a severance of appellant's case from that of the co-defendant after the conclusion of the guilt phase of the trial and before commencement of the separate sentencing proceeding. This contention is based upon the fact that at sentencing, the prosecutor sought from the jury a recommendation of death for appellant but not for the co-defendant. The jury returned recommendations on the two defendants accordingly and the judge sentenced them consistently with the jury's recommendations. Appellant's argument is without merit. Defense counsel moved for a severance before trial, which motion was denied. Counsel could reasonably have concluded that to renew the motion after the guilt phase was over would have been a futility in that there was no legal ground for entitlement to such a benefit. Where co-defendants are tried together on a capital charge, there being no ground for a severance of the guilt-or-innocence phase of the trial, it is proper for the court to proceed with a joint sentencing trial so that the same jury that heard all the guilt-phase evidence can consider and weigh the relative roles and culpability of the offenders. As for appellant's contention that his counsel should have objected to the prosecutor's closing argument in which he sought a death recommendation for appellant without mentioning the co-defendant, we find that such argument was a matter of prosecutorial discretion and as such was not objectionable. The evidence showed that both appellant and his co-defendant were guilty of armed robbery but that as far as murder was concerned, appellant was the one who did the shooting. He was guilty of intentional

murder and the co-defendant's guilt was based either on liability as an aider and abettor or the felony murder rule. The jury, in making capital sentencing recommendations, was entitled to consider this disparity of degree of participation in the murder. Thus there was no deficiency in the lack of objection by defense counsel on this point.

Appellant contends that defense counsel was ineffective in that he did not object to the prosecutor's argument that the two aggravating factors, "commission in the course of a robbery" and "commission for pecuniary gain" were both applicable. Appellant also faults defense counsel for not objecting to the argument that the murder was "especially heinous, atrocious, or cruel." While appellant now says his counsel should have sought to prevent such prosecutorial arguments by objecting, we find that defense counsel adequately discharged his duty by making responsive arguments to the jury and judge in rebuttal to those of the state on both of these points. We cannot conclude that there was a breakdown of the adversary process when the arguments of both sides were fully aired before the jury and the sentencing judge. Moreover, on appeal this Court found that the robbery and the pecuniary gain should have been considered as one and the same factor and that the murder was not especially heinous, atrocious, or cruel compared to other murders, but nevertheless concluded that the sentence of death was still appropriate under the circumstances despite the errors. By arguing these points at trial and preserving them for review, defense counsel performed his adversary role properly.

Having found all of appellant's ineffectiveness claims to be without merit, and his other claims to be not cognizable in this proceeding, we affirm the denial of the motion for post-conviction relief.

HABEAS CORPUS

In his petition for habeas corpus Maxwell claims that the legal representation provided to him in connection with his previous appeal of convictions and sentence was inadequate and that the lack of adequate legal counsel deprived him of a complete and meaningful appellate process. To be legally and constitutionally sustainable, petitioner's convictions and sentence of death are required to have been tested by a full and meaningful appellate review process. See Proffitt v. Florida; §§ 921.141, 924.06, Fla. Stat. (1981). The same judicial test set forth above in connection with the claim of ineffective trial counsel applies to a claim of ineffective appellate counsel. Strickland v. Washington, 466 U.S. 668 (1984).

Petitioner contends that he is entitled to a renewed appeal of both his convictions and his sentence of death on the ground of ineffective counsel because his appellate counsel failed to argue that the trial court had erred in excluding a prospective juror for cause based on views about capital punishment. As noted in this Court's opinion issued in deciding petitioner's appeal, however, the question was not preserved for appeal by means of an objection at trial. The present petition identifies a different prospective juror as having been improperly excused for cause as the basis for ineffectiveness of appellate counsel in not arguing it. Petitioner cannot prevail on this claim. In the first place, appellate counsel, had he raised the matter, would have been barred from relief by the lack of an objection at trial. Secondly, the record shows that both prospective jurors were properly excused for cause. Wainwright v. Witt, 105 S.Ct. 844 (1985).

Next petitioner argues that his appellate counsel was deficient in not arguing on appeal that his rights as a defendant at trial were violated by his prejudicial display in custody of officers before the panel of prospective jurors. Although defense counsel at trial moved to strike the jury venire on the ground of prejudice caused by the close escort by officers, we do

not find that appellate counsel was required to argue this specific contention in order to be a reasonably effective appellate advocate. As this was not a case in which the accused was shackled to his chair or presented in prisoner's clothing, and the viewing of the defendant in custody was by a jury venire rather than the actual jurors who heard the case, it is highly unlikely that counsel could have persuaded this Court that reversible error had occurred. See, e.g., Johnson v. State, 465 So.2d 499 (Fla.), cert. denied, 106 S.Ct. 186 (1985). Much more extreme measures have been justified when determined to be necessary to courtroom security. United States v. Theriault, 531 F.2d 281 (5th Cir.), cert. denied, 429 U.S. 898 (1976).

Petitioner contends that appellate counsel was ineffective in that he did not argue that the trial court's instructions to the jury on sentencing had improperly limited the jury's consideration of mitigating factors to only the mitigating circumstances listed in the sentencing statute and that the sentencing court also limited itself similarly in its consideration of mitigating factors. With regard to this specific sentencing issue, we conclude that appellate counsel could reasonably have determined that such an argument did not contain much promise of success on appeal. There was no objection at trial, so there could have been no relief on appeal unless this Court had perceived fundamental error. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933 (1981). The trial court had freely permitted testimony and evidence on non-statutory matters to be presented to the jury, thus indicating that the court and the jury correctly understood that they were not limited in their evaluation of evidence in mitigation. Moreover, this Court has held many times that the standard sentencing instructions such as those given in this case do not have the effect of imposing improper limitations on the consideration of mitigating circumstances. See Straight v. Wainwright, 422 So.2d 827 (Fla. 1982); Songer v. State, 365

So.2d 696 (Fla. 1978) (on rehearing), cert. denied, 441 U.S. 956 (1979).

Finally appellant argues that there was deficient performance of appellate counsel by reason of a lack of adequate appellate argument on the appropriateness of the death sentence. We reject this argument. In deciding the appeal this Court provided an independent review of the sentence, even rejecting certain erroneous aggravating circumstances and removing them from consideration on its own motion. The lack of appellate argument on the propriety of the death sentence was not, under the circumstances of this case, a serious impairment of the right of effective assistance of counsel in the appellate review process. Appellate counsel did present arguments concerning the procedural fairness and reliability of the trial and the sentencing process. Counsel was not required, in order to be considered effective, to make a separate attack on the propriety of the death sentence. Counsel could reasonably have concluded that it would have been futile to argue that the death sentence was inappropriate in a case where the evidence showed premeditated murder in the course of a robbery and the jury recommended a sentence of death. We therefore conclude that petitioner received effective assistance of counsel on appeal of his sentence of death and is not entitled to a renewed appeal thereof.

Accordingly, the petition for writ of habeas corpus is denied. As was stated previously, the denial of the motion for post-conviction relief is affirmed. The previously entered stay of execution is vacated.

It is so ordered.

ADKINS, OVERTON, McDONALD, EHRLICH and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Original Proceeding - Habeas Corpus and An Appeal from the Circuit Court in and for Broward County,

Thomas M. Coker, Judge - Case No. 80-8767

Steven H. Malone, St. Petersburg, Florida,

for Petitioner/Appellant

Jim Smith, Attorney General, and Richard G. Bartmon and Robert F. Teitler, Assistant Attorneys General, West Palm Beach, Florida,

for Respondent/Appellee

APPENDIX B

Chester MAXWELL, Appellant,

v.

STATE of Florida, Appellee.

No. 60754.

Supreme Court of Florida.

Dec. 15, 1983.

Rehearing Denied Feb. 7, 1984.

R.E. Conner, Plantation, for appellant.

Jim Smith, Atty. Gen. and Andrea T. Mohel, Asst. Atty. Gen., West Palm Beach, for appellee.

BOYD, Justice.

This cause is before the Court on appeal from a judgment of conviction of first-degree murder and robbery and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

The appellant, Chester Maxwell, and his co-defendant, Dale Griffin, were found guilty by a jury and convicted of the murder of Donald Klein. The evidence showed that Mr. Klein was playing golf with three friends at the Palmaire Country Club in Pompano Beach, Broward County, when Maxwell and Griffin approached. Griffin grabbed one golfer and held a knife to his throat while appellant pulled out a revolver. The assailants robbed three of the men of their money, the fourth golfer having nothing of value on his person. From Donald Klein appellant took a gold bracelet, a gold chain and some gold pendants. Appellant also demanded Mr. Klein's gold ring. When Klein protested that his wife had given him the ring, appellant shot him in the chest. He died within minutes. Both the heart and the lungs were severely damaged by the bullet, which was a .22 caliber rifle bullet cut off at the nose so it would fit into the pistol's chamber.

One of the victim's golfing companions chose appellant from an identification line-up and at trial testified that he saw appellant shoot Donald Klein.

After the shooting appellant and Griffin ran from the area and that night they departed Broward County on a northbound Greyhound bus. Upon learning this, the Pompano Beach police communicated with the Ocala police, who boarded the bus when it stopped at the Ocala bus station. The Ocala police detained the pair and told them to claim their bags. Appellant and Griffin claimed one bag each, accompanied the officers to police headquarters, and consented to have their bags searched. At the time of their detention and questioning, the two suspects had in their possession the gold items taken from Donald Klein. These items were identified by his widow at the trial.

Suspecting that appellant and Griffin had left possessions on the bus when they were detained for questioning, the Pompano Beach police sought the assistance of the Tallahassee police. When the bus arrived in Tallahassee, police officers arranged to have all the passengers and their luggage removed from the bus. When the bus was emptied, one brown suitcase remained unclaimed. The officers looked inside and found a knife and a .22 caliber pistol. Subsequent examination revealed that the six-chambered pistol contained five .22 caliber rifle bullets with their forward ends cut off.

Prior to trial appellant filed a motion to exclude from evidence the items found in the suitcase recovered in Tallahassee on the ground that its search without a warrant was unconstitutional. The trial court denied the motion on the ground that appellant lacked standing to object to the evidence on constitutional grounds. The jury found appellant and his co-defendant guilty of first-degree murder and three counts of armed robbery. A separate sentencing proceeding was held, and the jury recommended a sentence of death for appellant and a sentence of life imprisonment for co-defendant Griffin. The judge followed both recommendations.*

In this appeal, appellant argues that the trial court erred in denying the motion to suppress; in denying the motion to exclude television cameras from court without holding an evidentiary hearing; in excusing for cause a prospective juror who expressed qualms about the death penalty; by not asking the jury foreman whether the sentencing recommendation was concurred in by a majority; in denying a motion to compel the state to disclose the names of the witnesses it planned to present at the sentencing hearing; and in not furnishing defense counsel with the presentence investigation report in time to prepare for rebuttal. Since we find none of these arguments to be substantiated, we affirm appellant's convictions. We have also reviewed the sentence of death and find it to be appropriate.

[1] Appellant argues that the search, without a warrant, of the suitcase taken from the Greyhound bus in Tallahassee violated his right to be free from unreasonable searches and seizures under the Fourth Amendment and that therefore the articles seized from within the suitcase should have been excluded from evidence. The evidence showed, however, that when appellant and Griffin were detained for questioning in Ocala they each claimed one suitcase but they left the third suitcase on the bus. Thus they abandoned all possessory interests and expectations of privacy in the suitcase. The subsequent recovery and examination of the suitcase by law enforcement authorities was therefore not a search within the meaning of the Fourth Amendment. The retrieval and retention of the suitcase therefore could not have violated the constitutional right of appellant to be free in his person, home, papers and effects from unreasonable searches and seizures. *See United States v. Jackson*, 544 F.2d 407 (9th Cir.1976); *United States v. Colbert*, 474 F.2d 174 (5th Cir. 1973) (en banc); *State v. Oliver*, 368 So.2d 1331 (Fla. 3d DCA 1979), *cert. dismissed*, 383 So.2d 1200 (Fla.1980); *Riley v. State*, 266 So.2d 173 (Fla. 4th DCA 1972).

[2-4] Next appellant claims that the trial court erred in denying his motion to exclude the electronic media from the courtroom without holding an evidentiary hearing. We enunciated the test for excluding electronic media coverage of courtroom proceedings in *In re Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 779 (Fla.1979):

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the

* Co-defendant Griffin having received a life sentence, his appeal went to the District Court of Appeal for the Fourth District. The conviction was affirmed without opinion. *Griffin v. State*, 412 So.2d 501 (Fla. 4th DCA 1982).

EDITOR'S NOTE

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effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

In *State v. Green*, 395 So.2d 532 (Fla.1981), we stated that if the judge is called upon by a proper motion to make such a determination, an evidentiary hearing is required. "A proper motion should set forth facts that, if proven, would justify the entry of a restrictive order. General assertions or allegations are insufficient." *Id.* at 538. The televising of a trial does not *per se* impinge on the right to fairness and impartiality. A motion to limit or exclude television coverage must attempt to show with specificity that it will deleteriously affect the trial. *See Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981), *aff'g*, 366 So.2d 64 (Fla. 3d DCA 1978), *cert. denied*, 376 So.2d 1157 (Fla. 1979). Appellant concedes that his motion contained only general assertions, but argues that this failure was excusable because trial counsel did not know and could not have known prior to trial that the electronic media representatives would appear. This is not an adequate excuse for failing to seek relief before trial by a proper motion. Since our decision in *Post-Newsweek*, all persons in this state have had constructive if not actual notice that courtroom proceedings may be covered by the electronic media. Whether television and radio concerns will broadcast a particular courtroom proceeding in whole or in part is a matter solely within their control. Litigants and their attorneys are not entitled to notice that a trial will be broadcast, but presumably they are free to attempt to find out in advance. In any event, if the media representatives wish to provide such coverage, and the prospect of such coverage is a matter of concern to accused persons or their attorneys, they must bring their objections to the attention of the court by motion in time to allow for a proper pre-trial determination of the suitability of electronic media coverage.

[5] As for appellant's argument that the trial court erred in excusing for cause a prospective juror who had expressed reservations or conscientious beliefs about the death penalty, we find this point has not been properly preserved for appeal since appellant's trial counsel failed to pose a timely objection. *Maggard v. State*, 399 So.2d 973 (Fla.), *cert. denied*, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981); *Brown v. State*, 381 So.2d 690 (Fla.1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981). Moreover, if we were to reach the merits of this point we would find no error because the juror in question was properly excused.

[6] We also find that appellant has failed to preserve for appeal his argument that the trial court erred in not asking the jury foreman whether a majority of the jury concurred in the advisory recommendation of death. No such request was made at the trial. Appellant's argument that the trial court was compelled to make such an inquiry upon its own motion is totally without merit.

[7] Next appellant argues that the trial court erred in denying his motion, filed pursuant to Florida Rule of Criminal Procedure 3.220(a), for a list of witnesses and of tangible papers or objects the prosecutor intended to use at the sentencing hearing. Appellant contends the rule and due process require that the state disclose such information. This Court has held that one accused of a capital offense does not have a due process right to pre-trial notice of the aggravating circumstances the state intends to prove. *Sireci v. State*, 399 So.2d 964 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982); *Menendez v. State*, 368 So.2d 1278 (Fla.1979). *See Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). As far as any procedural rights in the sentencing process which appellant may have had under Rule 3.220(a) are concerned, we find that there was no prejudicial error.

Appellant's final argument is that the record does not show that his trial counsel received a copy of the presentence investi-

gation report which the trial judge relied upon in imposing the death sentence. The state has supplemented the record with an affidavit from trial counsel that he did indeed receive a copy of the report before sentencing. We therefore find this point to be without merit.

Although appellant has not raised any objections concerning the judge's findings with regard to the aggravating and mitigating circumstances, we are required to review the sentence of death to ensure that it has been properly imposed. § 921.141(4), Fla.Stat. (1981). In his sentence the trial judge found as aggravating circumstances that appellant had previously been convicted of a felony involving the use of violence, section 921.141(5)(b); that the capital felony was committed during the commission of a felony, section 921.141(5)(d); that it was committed for pecuniary gain, section 921.141(5)(f); that it was especially heinous, atrocious, or cruel, section 921.141(5)(h); and that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). He found no mitigating circumstances.

[9–10] We find three errors in the judge's findings. First, it was error to consider as separate aggravating circumstances that the crime was committed during the commission of a robbery and for pecuniary gain, since these findings "refer to the same aspect of the defendant's crime." *Provence v. State*, 337 So.2d 783, 786 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Second, since the death was instantaneous, following a single shot, this crime cannot be considered especially heinous, atrocious, or cruel. *Riley v. State*, 366 So.2d 19 (Fla. 1978); *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). Third, the finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification was not proper under the circumstances of this case. Proof of this aggravating circumstance requires a showing of a state of mind beyond that of the ordinary premeditation required for a first-degree murder conviction. Here the evidence showed that appellant killed Donald Klein intentionally and deliberately but there was no showing of any additional factor to establish that the murder was committed in "a cold, calculated, and premeditated manner without any pretense of moral or legal justification." § 921.141(5)(i), Fla.Stat. (1981); *see Combs v. State*, 403 So.2d 418, 421 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982).

Despite these errors, we conclude that the sentence of death is still lawful because there are two aggravating circumstances and no mitigating circumstances. The previous conviction of a felony involving violence (armed robbery) was shown by documentary evidence. That the murder was committed in the course of a robbery was clearly demonstrated by the circumstances of the criminal episode.

[11–13] Where an intentional murder is committed in the course of a robbery and there are no mitigating circumstances, a sentence of death is appropriate. *E.g., Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976); *see generally State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The commission of murder in the course of a robbery by one who has previously been convicted of a felony involving violence to the person of another, when there are no mitigating circumstances, warrants a sentence of death. *E.g., Shriner v. State*, 386 So.2d 525 (Fla.1980), *cert. denied*, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981). Here the appellant had previously been convicted of a violent felony, the murder was committed in the course of a robbery, and there were no mitigating circumstances. Thus the facts of this case are equally or more aggravated than those in *Sullivan* and closely similar to those in *Shriner*. They are also comparable to those in *Jones v. State*, 411 So.2d 165 (Fla.), *cert. denied*, — U.S. —, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982), and *Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). Therefore, the sentence of death is proper under the law.

The convictions and sentence are affirmed.

It is so ordered.

ALDERMAN, C.J., OVERTON and EHRLICH, JJ., concur.

ADKINS, J., concurs in result only.

McDONALD, J., concurs with conviction, but concurs in result only as to sentence.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

MONDAY, JULY 21, 1986

CHESTER LEVON MAXWELL,	**	
Petitioner,	**	
vs.	**	CASE NO. 66,117
LOUIE L. WAINWRIGHT,	**	
Respondent.	**	
** ** ** ** ** ** **	**	
CHESTER LEVON MAXWELL,	**	
Appellant,	**	CASE NO. 66,129
vs.	**	
STATE OF FLORIDA,	**	Circuit Court Case No. 80-8767 (Broward County)
Appellee.	**	
** ** ** ** ** ** **	**	

On consideration of the motion for rehearing filed by attorney for petitioner/appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

cc: Hon. Robert E. Lockwood, Clerk
Hon. Thomas M. Coker, Judge

Stephen H. Malone, Esquire
Richard G. Bartmon, Esquire
and Richard G. Bartmon, Esqui

APPENDIX D

CHAPTER 921

SENTENCE

tenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sen-

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8463-248; s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

OPPOSITION BRIEF

ORIGINAL

CASE NO. 86-5541

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHESTER LEVON MAXWELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
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Counsel for Respondent

QUESTION PRESENTED

WHETHER PETITIONER HAS FAILED TO ESTABLISH OR DEMONSTRATE THAT THE FLORIDA SUPREME COURT'S AFFIRMANCE, OF THE TRIAL COURT'S DENIAL OF STATE POST-CONVICTION MOTION, DENIED HIM A FULL AND FAIR HEARING, IN VIOLATION OF DUE PROCESS RIGHTS?

TABLE OF CONTENTS

LIST OF CITATIONS

OPINIONS BELOW

The opinion of the Florida Supreme Court, which is the subject of the present Petition, is officially reported as Maxwell v. State, 490 So.2d 927 (Fla. 1986), and is set forth in Petitioner's Exhibit A. Petitioner's conviction and sentence, on direct appeal, were affirmed by the Florida Supreme Court's opinion, officially reported as Maxwell v. State, 443 So.2d 967 (Fla. 1983), and is set forth in Petitioner's Exhibit B.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement, although maintaining that Petitioner's claims are not reviewable by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement, to its limited extent, but makes the following additions, clarifications and corrections:

A. STATEMENT OF FACTS

After Petitioner's judgment and sentence were affirmed, on direct appeal, on December 15, 1983, Petitioner did not seek certiorari review, with this Court. From this date, until well after Governor Bob Graham of Florida executed a death warrant for Petitioner on October 9, 1984, Petitioner did not file any pleadings, in any court.

On October 9, 1984, Governor Graham issued the aforementioned death warrant, scheduling Petitioner's execution for between noon, November 1, 1984, and noon, November 8, 1984. The execution was set by the Florida prison superintendent, for 7 A.M., November 7, 1984.

On November 5, 1984, two days before his scheduled execution, Petitioner filed a motion to vacate his judgment and sentence, at around 9:00-9:30 A.M., pursuant to Rule 3.850, Fla.R.Crim.P. The State filed a Response, on the same date, to said Motion. The trial court held an evidentiary hearing on said motion; on November 5, 1984, the Circuit Court denied Petitioner's motion, and concurrent application for a stay of execution. (R, 302, 304).[1]

Petitioner filed an appeal, to the Florida Supreme Court, on November 5, 1984, and the parties submitted briefs. On November 6, 1984, the Florida Supreme Court heard oral arguments, and entered a stay of execution. Petitioner's challenge to the trial court's denial of post-conviction relief was ultimately denied by the Florida Supreme Court, on May 15, 1986, in the opinion which is the subject of this action.

At the evidentiary hearing, the State maintained that collateral counsel for Petitioner, Steven Malone, had had prior opportunities to speak with Petitioner's defense counsel at trial, Jeffrey Harris. (R, 17).

[1] Respondent's references to the Record, in the interest of clarity and convenience, will be by the same system as the Record on appeal was denoted, in state court. The entire transcript of the evidentiary hearing (R, 1-162), as well as the Record, at 302, 304, has been reproduced, as part of Respondent's Appendix.

Petitioner questioned several witnesses at the hearing, including Mr. Harris. (R, 18-75). Counsel for Petitioner was not limited from asking any relevant questions of Mr. Harris, while Harris was testifying, regarding his representation of Petitioner, in support of Petitioner's claim that Mr. Harris had provided ineffective assistance. (R, 18-68, 75). The trial court specifically observed that Petitioner's counsel seemed well prepared, during the hearing. (R, 59). Petitioner's counsel subsequently was not limited in presenting argument, on the grounds in his post-conviction motion. (R, 76-91, 159-162).

Furthermore, the State offered to stipulate that the doctors, and other witnesses who had submitted alleged documentation of Petitioner's post-conviction claims, would testify as they stated in the statements and affidavits submitted, along with his post-conviction motion. (R, 99). When the trial court asked if Petitioner had other witnesses to present, and stated he would hear any testimony Petitioner wished to offer (R, 102-105), Petitioner presented Patricia Flemming (R, 111-122); Lee Anna Tompkins (R, 122-132), Idellar Sims (133-141), and Petitioner's father, Joseph Maxwell (R, 141-153), in support of his motion. Petitioner's counsel proffered Department of Correction records (R, 153), and a psychological report from Dr. Harry Krop (R, 153), to which the State stipulated Krop would testify, to what he had stated in his report. (R, 154). Counsel was not prevented from proffering any and all other records and documentation of his claim. (R, 157, 159). Petitioner did not indicate that there were any more specified witnesses, regarding specific claims, to testify, other than those presented.

In denying Petitioner's motion for post-conviction relief, the trial court noted its consideration of Petitioner's allegations, and the testimony, including that of trial counsel. (R, 164-165).

B. HOW FEDERAL QUESTION WAS PRESENTED AND DECIDED IN THE COURTS BELOW

In his summary brief before the Florida Supreme Court, Petitioner maintained that he was denied a full and fair hearing on his ineffective assistance of counsel claim. Exhibit B[2], at 2-3. In its Supple-

[2] The transcript of the November 5, 1984 evidentiary hearing, is being filed in Respondent's Appendix, as Composite Exhibit A.

mental Response, the State responded that, in accord with the dictates of Strickland v. Washington, 466 U.S. 668 (1984), inquiry was permitted and made of defense counsel, at the evidentiary hearing, which rebutted Petitioner's claims. Exhibit C, at 4. The Florida Supreme Court expressly rejected this claim, as follows:

> Appellant argues that he received ineffective assistance of counsel at his trial in violation of his Sixth amendment rights and that the court below in ruling on his motion to vacate denied him an adequate evidentiary hearing. We find that the hearing on the motion comported with due process principles.

Maxwell v. State, 490 So.2d, at 932 (emphasis added).

REASONS FOR NOT GRANTING THE WRIT

ARGUMENT

PETITIONER HAS FAILED TO ESTABLISH OR DEMONSTRATE THAT THE FLORIDA SUPREME COURT'S AFFIRMANCE, OF THE TRIAL COURT'S DENIAL OF STATE POST-CONVICTION MOTION, DENIED HIM A FULL AND FAIR HEARING, IN VIOLATION OF DUE PROCESS RIGHTS.

Petitioner has maintained that the failure of the trial court to compel the production of trial counsel's files to Petitioner, on the day of his post-conviction evidentiary hearing, denied him a full and fair hearing, and prevented him from presenting evidence in support of his claim of ineffective assistance of counsel. However, an examination of the Record, conclusively rebuts the existence of any due process violation, and fails to establish an appropriate basis to invoke this Court's certiorari jurisdiction.

It is clear, under this Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), that assessment of counsel's performance, with regard to a criminal defendant's Sixth Amendment rights, involves examination of the facts and circumstances of counsel's conduct at the time of representation, and evaluation of such conduct, from counsel's perspective, as to its reasonableness. Strickland, at 694, 695. Under this Court's mandate, this involves inquiries directed to identifying "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment", for a judicial determination of whether such acts are "outside the range of professionally competent assistance". Strickland, at 695. As Petitioner argues, this evaluation may take into account an inquiry into the nature of conversations between counsel and the defendant. Strickland, at 696. The Record demonstrates that Petitioner's opportunity to establish these circumstances, including unlimited questioning of defense counsel at the evidentiary hearing, was full and complete.

The hearing established that Petitioner had several opportunities, prior to the hearing, to speak with trial counsel, through collateral counsel. (R, 17). Petitioner's questioning of Mr. Harris at the

hearing was not limited, and Petitioner had an unequivocally complete opportunity to question Harris, on all relevant aspects of his representation of Petitioner, at his capital trial and sentencing. (R, 18-68, 75). Petitioner was not prevented, prior or at the hearing, from any relevant inquiries on this subject, and the scope of his relevant inquiries was not unduly narrowed. (R, 18-68, 75). Additionally, Petitioner was given a full and complete argument as to counsel's effectiveness, on the Sixth Amendment grounds raised in his post-conviction motion (R, 76-91, 159-162), as well as presenting additional witnesses to rebut trial counsel's testimony, as to his acts and efforts on Petitioner's behalf. (R, 111-153). Petitioner was not prevented from proffering any and all specific documentation of his claim, and affidavits in support (R, 99, 153, 154, 157, 159); in fact, the State stipulated that live testimony of those witnesses who submitted reports and affidavits, would have been the same, as in those reports and affidavits. (R, 99, 154-159). Significantly, Petitioner did not in any way indicate or demonstrate, in a specified manner, that further inquiry of Harris was needed, or that there were any specifically identifiable claims or witnesses in support, other than those presented and proffered.

Thus, the nature of circumstances of the hearing, demonstrate the propriety of the Florida Supreme Court's finding that the evidentiary hearing comported with sufficient due process safeguards. Maxwell, 490 So.2d, at 932. This ruling was entirely consistent with this Court's prior precedent in Sumner v. Mata, 449 U.S. 539 (1981), in which this Court concluded that the presence of all parties before the state trial or appellate court, with the giving of an opportunity to be heard to a defendant, and plenary consideration of his claim, constituted a full and fair hearing, within the meaning of 28 U.S.C. 2254(d). Sumner, supra, 449 U.S., at 546. The Record undeniably establishes that Petitioner's claim was afforded full and complete consideration by both the state trial and appellate courts, under all of the circumstances and criteria referred to in Sumner. Furthermore, once Petitioner raised his claims before the state trial and appellate courts, and those courts issued rulings at his request, Petitioner cannot now complain that he did not receive a full and

fair hearing in either forum. Sumner, 449 U.S., at 546; 28 U.S.C. 2254(d), supra.

Petitioner has asserted that the Florida Supreme Court's decision is in conflict with the decision in Spivey v. Zant, 683 F.2d 881 (5th Cir. "B" 1982), thereby creating a basis for jurisdiction herein. However, the Spivey decision is factually distinguishable, from the circumstances that the Florida Supreme Court reviewed, in this case. The actual primary bases, for the Fifth Circuit's ruling that the defendant should have been granted access to his attorney's file, was that said counsel had denied access because the files were his personally, and that counsel had expressly referred to the files, during his testimony. Spivey, supra, at 884, 884, n. 4, 885. Petitioner's defense counsel did not refuse access, on the basis that his files belonged to him, and does not appear to have used the files during his testimony, to refresh his recollection. (R, 18-75). Id. It is also significant that collateral counsel for Petitioner, does not appear to have subpoenaed counsel's files, even on the day of the hearing, and did not ask the court to compel production of the files, until at the hearing. (R, 19). The Spivey ruling thus appears to have been primarily dependent on factual circumstances, particularly the inability to cross-examine counsel on acts and events he was actually reading from the file, during testimony. Spivey, at 885. Furthermore, the Spivey court did not ultimately reject the attorney's interest therein in withholding mental impression, theories and opinions from the client, because the defendant therein offered to allow the attorney to excise those materials, before the defendant viewed the file. Id. Petitioner's failure herein to do the same, reveals an additional factual distinction which, along with those mentioned, makes Spivey inapplicable, and does not create the conflict Petitioner alleges.

Since Petitioner's claim creates no appropriate basis for certiorari, and no conflict concerning Federal law was created by the state court's resolution of the issue, certiorari review should be denied.

CONCLUSION

WHEREFORE, the Respondent respectfully requests that this Honorable Court DENY the Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CASE NO. 86-5541

CHESTER LEVON MAXWELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, RICHARD G. BARTMON, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida, in the above case to Petitioner, by depositing same in the United States Post Office box, addressed as follows:

ANDREW A. OSTROW, Esquire
Attorney for Petitioner
100 N.E. 3rd Avenue - Suite 1100
P.O. Box 4098
Ft. Lauderdale, FL 33302-4098.

All parties required to be served, have been served. Done this 8th day of October, 1986.

RICHARD G. BARTMON
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Counsel for Respondent

CASE NO. 86-5541

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHESTER LEVON MAXWELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPENDIX

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OPINION

SUPREME COURT OF THE UNITED STATES

CHESTER LEVON MAXWELL *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 86–5541. Decided November 17, 1986

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Florida Supreme Court insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would nevertheless grant certiorari because petitioner's Sixth Amendment right to effective assistance of counsel required that he be given access to his trial counsel's work files for use in his state habeas corpus hearing in which he alleged that trial counsel's representation was constitutionally deficient.

I

Petitioner was convicted of murder and sentenced to death after a jury trial. The Supreme Court of Florida affirmed his conviction and sentence on direct appeal. 443 So. 2d 968 (1983). Following the issuance of a death warrant, petitioner sought habeas corpus relief in state court. After a hearing, the habeas petition was denied; the Supreme Court of Florida again affirmed. 490 So. 2d 927 (1986).

The petition stated a claim for ineffective assistance of trial counsel, challenging counsel's failure to make certain motions and objec-

tions in the course of petitioner's defense. The habeas petition also alleged that trial counsel, engaged in his first attempt to defend a client on capital charges, inadequately investigated petitioner's background in preparation for the penalty phase of the trial. 490 So. 2d, at 932–933.

Prior to the hearing, petitioner's trial counsel refused habeas counsel's informal request to produce work files pertaining to petitioner's defense. Time constraints did not permit habeas counsel to subpoena these materials before filing petitioner's motion for habeas corpus relief.[1] When the trial attorney testified at the hearing, he admitted denying access to the requested files and again refused production. He offered this justification for his refusal:

> "It is my reason and belief that . . . if I'm going to divulge or reveal or to allow people to inspect my files it should be done by court order from either side and the reason for that belief is that I think and believe wholeheartedly that if an attorney who's a trial attorney is preparing his case for trial that if its going to be subject to review a couple of years later it may put a chilling effect on an attorney making notes or work product or whatever have you.
>
> "In other words, that attorney may not be as free to express himself within his own confines of his file and, consequently, until a court orders me to do so and that's determined to be a lawful order, I have refused permission to turn it over to you." App. to Pet. for Cert. 19–20.

Habeas counsel then moved to compel production of the trial attorney's entire file. The state court denied this motion "based upon [trial counsel's] rationale." *Id.*, at 20.

Without the file, petitioner was unable to demonstrate the alleged deficiency of trial counsel's representation, particularly with respect to his preparation for the penalty phase of petitioner's trial. This was due in large part to the attorney's apparent inability to recall important details of his representation. For example:

> "Q: Did you obtain a release from Mr. Maxwell to try to take a look at any of [the state's] records?
> A: I don't have any recollection of that.

[1] Habeas counsel agreed to represent petitioner on October 30, 1984. The State of Florida had scheduled petitioner's execution for November 7, 1984.

> Q: So you didn't even obtain a release from Mr. Maxwell?
> A: I didn't say that.
> Q: You said you don't have any recollection?
> A: Exactly.
> Q: Would it be in the file if you had?
> A: You're asking hypothetical questions and I don't know. I make notations on actions that I take in a great majority of times. Sometimes I don't make notations. So it's hard for me to answer that.
> Q: Something like a release of medical information?
> A: That should be in the file.
> Q: Did you try to obtain or review any of Mr. Maxwell's medical records?
> A: I have no recollection of that.
>
> . . . . .
>
> Q: Other than the motions and memoranda you filed in the court file to the penalty phase, did you prepare any internal memorandum regarding the application of the aggravating and mitigating circumstances to this case?
> A: I had a lot of law or some law—the word "a lot" is relative—into that case and whether I dictated memorandums or not, I don't remember. If I have them, I have them. If I don't, I don't.
> Q: But again those would be in your file; wouldn't it?
> A: Yes. . . .
>
> . . . . .
>
> Q: Do you recall finding out about any traumatic experiences Mr. Maxwell had?
> A: I may or may not have.
> Q: You may or may not?
> A: I'm sure I dealt in that area though.
> Q: Did you speak with any teachers Mr. Maxwell had?
> A: I have no recollection doing that at all.
> Q: Ministers?
> A: Now Joseph Maxwell was very religious and I don't remember whether I talked to a minister or priest or clergyman in that area or not. I don't specifically remember although it's possible.
>
> You have to remember its three years I have not looked at the file and there's just things I don't remem-

ber because of the multitude of things that have happened since then.

Q: I understand. If we had the file, would we be able to find out the answers to some of these questions?

A: I'm afraid not. In some areas, yes, in some areas, no, because I don't make extensive notes on what I don't do. What I do is make notes on what I do do. And when you're coming from a negative position, I will not necessarily have notes to protect myself. More or less, I don't prepare a case to protect myself.

So I may not have those kinds of notes. I would have notes as to what I did do." App. to Pet. for Cert. 27–28, 36, 44–45.

On appeal to the Florida Supreme Court, petitioner argued that the denial of his requests for access to his trial attorney's files had impaired his due process right to a full and fair evidentiary hearing on his claim of ineffective assistance of counsel. The court rejected this argument with no substantive discussion, holding simply that "the hearing on the motion comported with due process principles." 490 So. 2d, at 932.

II

An essential element of our society's protection of citizens accused of crime is the right to effective assistance of counsel. *Strickland* v. *Washington*, 466 U. S. 668 (1984); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). "Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively the attorney must work closely with the defendant in formulating defense strategy. . . . Moreover, counsel is likely to have to make a number of crucial decisions throughout the proceedings on a range of subjects that may require consultation with the defendant. These decisions can best be made, and counsel's duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence." *Morris* v. *Slappy*, 461 U. S. 1, 21 (1983) (BRENNAN, J., concurring in the result). Counsel's duty to maintain this trust and confidence extends beyond the trial itself. Though he may not continue to represent the defendant following conviction and the disposition of post-trial motions, he must nevertheless cooperate with defendant's attempts to challenge the conviction or sentence, especially if he possesses unique information about a claim the defendant seeks to raise.

Use of this information may be the decisive factor in determining the defendant's failure or success on direct or collateral review.

A defendant's interest in the information in his trial counsel's exclusive possession is of even greater significance when the defendant alleges ineffective assistance by trial counsel. Providing access to such information unquestionably advances the inquiry this Court identified in *Strickland* v. *Washington*, *supra*, at 689, as essential to determining whether counsel has rendered ineffective assistance: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." There is no more accurate or reliable evidence of trial counsel's actual perspective and the extent of preparation undertaken than the contents of his client's case file. Access to these materials is critical where, as here, trial counsel's testimony rests on little more than vague recollections. Indeed, with respect to petitioner's allegations that his trial attorney did not adequately prepare for the sentencing proceeding, petitioner's need for access to the work files is of paramount importance. Denying access to what may be the most relevant evidence of the adequacy of legal representation is, in this respect, "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment. . . .'" *Caldwell* v. *Mississippi*, —— U. S. ——, —— (1985) (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976)).

The courts below erred, in violation of petitioner's Sixth Amendment rights, in accepting trial counsel's reasons for withholding petitioner's files.[2] The right to effective assistance fully encom-

[2]To the extent the Florida courts accepted trial counsel's suggested work-product doctrine, their rulings vastly misconstrue this doctrine's underlying purpose; the privilege to withhold an attorney's work product belongs to *the client*, and in this case petitioner seeks access to files retained by his *own attorney*. Cf. *Spivey* v. *Zant*, 683 F. 2d 881, 885 (CA5 Unit B 1982) (interpreting Fed. R. Civ. P. 26(b)(3)). The attorney's asserted need to ensure that he is "free to express himself" within the confines of a written file is likewise without merit. He seems to claim that if his recorded thoughts are not protected from discovery, he will be less likely to inform himself and consider along with his client the various defensive strategies that might be available. In other words, he argues that he will be less likely to provide effective assistance of counsel, and yet this is pre-

passes the client's right to obtain from trial counsel the work files generated during and pertinent to that client's defense. It further entitles the client to utilize materials contained in these files in any proceeding at which the adequacy of trial counsel's representation may be challenged.[1]

I would grant the petition for certiorari.

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cisely the issue petitioner wishes to investigate. I cannot accept that a lawyer should oppose the disclosure of recorded thoughts that do not evidence ineffective assistance; nor can I accept that petitioner's Sixth Amendment rights do *not* prevail over his lawyer's asserted privacy interests where that lawyer's recorded thoughts may reflect that ineffective assistance has in fact been rendered.

[1]Though states are not constitutionally required to establish avenues for seeking post-conviction relief from an erroneous conviction, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U. S. 387, 401 (1984).